



DEAL OR NO DEAL

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No two M&A transactions are the same but, in this article, we discuss an M&A transaction that was unlike any other. It promptly took off, but terminated mid-flight. We will reflect on our learnings and highlight some of the financial and legal implications involved in calling off a deal.

The Transaction

The sellers or shareholders of a telecommunications company based in East Africa (the Clients) wanted a quick exit. The Clients had intentions to diversify their portfolio and leave the telecommunications business behind. As their company (the Target) was well respected, our Clients were not short of offers. Eventually, they settled on the highest bidder (the Purchaser), and so began our involvement. First, in negotiating the letter of intent (LOI); second, in drafting the share purchase agreement (SPA); and thirdly, in managing the due diligence process and completing the transaction.

The LOI was not negotiated and hence was a simple document confirming the parties' mutual intentions to enter into the SPA, with a limited exclusivity period. The SPA, which was negotiated and was subject to usual conditions precedent (CP), such as regulatory approval and due diligence, contained one particular CP, which proved to be the undoing of the entire transaction – a CP on the transfer of two properties (the Properties) owned by the Target to the Clients.

With time being of the essence and the deposit having been paid to the Clients' Advocates in escrow, on the signing of the SPA, the small matter of the tax implications – not to mention the financial implications of transferring the Properties – came into full view. On receipt of tax advice, it became clear that the most viable option for the Clients was for the Properties to remain in the Target and for the business and assets to be transferred to a newco, which the Purchaser would then acquire.



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The potential timeline involved in the transfer of the business and assets, the amounts payable in stamp duty and capital gains on these transfers, and the inability of the parties to agree on the way forward meant that the SPA had to be terminated.

Cue the next hurdle. Which party was liable for the costs on termination? The SPA provided that if the Purchaser terminated the transaction, our Clients were not bound to refund the deposit. In the alternative, if our Clients terminated the transaction, the Purchaser had the right to a refund and to claim damages for breach of the SPA. With neither party willing to pull the trigger, or willing to take responsibility for the termination, we eventually negotiated a walk away with both parties signing a no-fault mutual termination agreement, with each party bearing their own costs and the Purchaser's deposit being fully refunded.

Notwithstanding the fact that no penalties accrued, both parties incurred tangible costs and opportunity costs. For instance, the deposit paid in escrow was not earning interest for the period. Further, the Purchaser not only incurred legal costs involved in this transaction, but also lost the benefits they foreseeably would have enjoyed had these funds been paid towards a different venture. Likewise, our Clients incurred legal costs and the opportunity to close the sale of the Target.

Wins and Lessons Learned

For any legal team, the energy and investment put into a transaction can mean that a No Deal! scenario can lead to disappointment. However, there are valuable lessons to be learnt in:

- a) pushing for a slower transaction timeline – especially where there are commercial unknowns;
- b) anticipating a No Deal! and potential cost implications. Both parties in this case had anticipated a walk away, but this still did not cater for this particular scenario. Which party could be said to be at fault;
- c) working with opposing counsel for the benefit of the respective clients. Opposing counsel understood the importance of brokering a deal for each party, and this meant that negotiations toward the end remained cordial; and
- d) being flexible. Although this was a No Deal! in the end, we were able to retain the Clients and hope to be able to see another transaction through. As legal counsel, our job is not only to ensure that our client is happy, within the confines of the law, but to also ensure that we run a business that withstands such obstacles.

In conclusion - No Deal! No doubt, we shall carry over our lessons learnt in the transactions to come.

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